Filed 9/21/06 Khazin v. Kono CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AZAR KHAZIN, Plaintiff and Appellant; v. SLAVA KONO, Defendant and Respondent; YEVGENIYA G. LISITSA, Objector and Appellant.	B187390 (Los Angeles County Super. Ct. No. LC071598)

APPEAL from an order of the Superior Court of Los Angeles County, Richard G. Kolostian, Judge. Reversed.

Law Offices of Yevgeniya G. Lisitsa and Yevgeniya G. Lisitsa for Plaintiff and Appellant and for Objector and Appellant.

Gurovich & Associates and Elon Berk for Defendant and Respondent.

Azar Khazin and his attorney Yevgeniya G. Lisitsa appeal an order entered after the voluntary dismissal of Khazin's complaint. The order directs Khazin to return to defendant Slava Kono funds that were held in trust by Khazin's former counsel, Payman Taheri, pursuant to a stipulation. Taheri purportedly had released the funds to Khazin pursuant to a prior court order relieving Taheri as counsel. Khazin then filed a request for dismissal, and the clerk entered a dismissal. On Kono's postdismissal motion, the court concluded that the release of funds to Khazin was improper, ordered the funds to be returned to Kono, and ordered Khazin and Lisitsa to pay Kono $3,750 in "sanctions." Khazin and Lisitsa contend the court lacked both jurisdiction and authority to order either the return of funds or a monetary sanction. We conclude that the court had no authority under Code of Civil Procedure section 405.37[1] to order the return of funds and no jurisdiction to grant a purported motion for reconsideration under section 1008, subdivision (b). We also conclude that there is no basis for the $3,750 award either as a sanction or as attorney fees awarded to the party prevailing on a motion. We therefore reverse the order in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Khazin filed a complaint against Slava Kono and others on May 31, 2005, alleging counts for unjust enrichment and conversion arising from a real estate purchase loan. Khazin alleged that the loan nominally was made by Reliant Real Estate, Inc.

[1] All further statutory references are to the Code of Civil Procedure unless stated otherwise.

(Reliant), but that Khazin had provided $50,000 of the loan funds and that the defendants had failed to repay him. He alleged that the transaction was the subject of a prior collection action against the same defendants (*Reliant Real Estate, Inc. v. Sherman*, Super. Ct. L.A. County, No. LC067934) that had been had been settled but without payment to Khazin. Taheri represented Khazin in this action and previously represented Reliant in the prior action. Khazin filed the complaint but did not serve it on the defendants. Khazin recorded a lis pendens against the real property.

Khazin and the defendants, through their counsel, stipulated to withdraw the lis pendens. The stipulation dated June 16, 2005, provided that in lieu of the lis pendens, Kono would provide "$37,500 to be held in trust pending the resolution of the above-entitled matter." It provided that Taheri would hold the funds in trust until either (1) all defendants agreed to disburse the funds "pursuant to settlement of the above-entitled case"; (2) the entry of judgment, in which case the funds would be disbursed to the prevailing party; or (3) "[p]ursuant to an order of the Court authorizing the release of the funds." The parties did not file the stipulation at the time or request an order on the stipulation. Kono provided the funds to Taheri pursuant to the stipulation.

Khazin, represented by Lisitsa, filed an ex parte application on June 20, 2005, to relieve Taheri as his counsel and order Taheri to turn over to Khazin all records and property of any kind related to this case, with the sole exception of documents protected by the attorney-client privilege or attorney work product pertaining to Taheri's former representation of Reliant. Khazin stated that he wished to represent himself until Lisitsa had an opportunity to review the files to determine whether she would accept the case.

Lisitsa provided notice of the ex parte application to Taheri, whose address and telephone number were the same as Lisitsa's, but provided no notice to the defendants, who had not yet filed an appearance. In a written order dated June 20, 2005, the court granted the application, relieved Taheri as counsel, and ordered him to turn over to Khazin "all things related to this case, tangible or intangible, including but not limited to records, documents, pleadings, funds, attorney notes and attorney borne investigative work and discovery," with the exception of matters confidential to another client.

Khazin, in pro per, filed a request for dismissal without prejudice dated June 22, 2005. The clerk entered the dismissal on June 24, 2005. When the defendants' counsel contacted Taheri in August 2005 to determine the status of this case, Taheri stated that he had released the funds to Khazin pursuant to a court order and that the case had been dismissed.

Kono filed a motion on August 31, 2005, for an order to return to Kono the $37,500 previously held in trust by Taheri. Kono argued that this action was an attempt by Khazin to recover from the defendants some of the same money that Reliant had sought to recover from the defendants in the prior action but had failed to recover through settlement. He argued that the purported reasons for the motion to relieve Taheri as counsel were specious and that Taheri and Lisitsa had conspired together to obtain a court order to turn over the funds to Khazin. He argued that Lisitsa was able to obtain the order only because she had failed to inform the court of the stipulation and the funds held in trust and failed to inform the defendants of the ex parte application. He argued that counsel's actions were deceitful and a breach of professional ethics. He

argued that the funds held in trust were an undertaking and that section 405.37 authorized the court to "exonerate or modify" (*ibid.*) such an undertaking by ordering the return of the funds. Kono requested an order against Khazin and Taheri jointly and severally for return of the funds. He also requested an award of attorney fees in the amount of $3,150 under section 405.38 as the party prevailing on a motion under section 405.37.

Khazin, through Lisitsa as his counsel, argued in opposition that the $37,500 was intended to be part of an anticipated $50,000 settlement to be consummated upon the funding of Kono's refinancing loan. Khazin argued that Kono had reneged on the tentative settlement by failing to pay the remaining $12,500, and that Khazin had decided to dismiss the action rather than pursue that amount. He argued that the court had no jurisdiction to decide the motion after the case had been dismissed and that Kono's only remedy was to commence an independent action. He also argued, apart from lack of jurisdiction, that section 405.37 was inapplicable. Khazin requested an award of attorney fees and costs in the amount of $3,750 under section 405.38 against Kono and his attorney Elon Berk and, apparently referring to the same statutory fee award, requested "sanctions . . . for bringing a legally frivolous and bad faith motion." Taheri, on his own behalf, also objected to any exercise of jurisdiction by the court after the dismissal.

At the hearing on the motion on September 13, 2005, Lisitsa appeared on behalf of Khazin, and Berk appeared on behalf of Kono, but Taheri did not appear. The court stated, "The money was supposed to be held until there was a settlement. The previous

lawyer came in here with a bogus dismissal without telling the court what it was about and somehow it got through here, now that they want the money. Is that right?" The court stated further: "We're just going to issue an OSC re contempt on--what's the name of that lawyer?" "We'll set it for contempt hearing. You might want to have a lawyer. I don't think there's criminal possibility, but there's certainly contempt possibility." The court scheduled a contempt hearing.

At the contempt hearing on October 25, 2005, counsel discussed the circumstances of the prior ex parte application for an order relieving Taheri as counsel and whether the court had jurisdiction to issue an order under section 405.37. The court stated, "We are not talking about the contempt. We are talking about this case." At the conclusion of the hearing, the court stated, "The motion to return the funds is granted. The sanctions are $3,750 ordered against Slava Kono." Upon prompting by counsel, the court corrected itself by stating, "Mr. Khazin, K-H-A-Z-I-N, and his attorney Miss Gina Lisitsa for $3,750. The court is making this under 1008(b)." The court stated further that it would not rule on the contempt and was transferring the case to another judge to determine whether to proceed with a contempt hearing.

A minute order entered on October 25, 2005, identified the "motion of defendants, Mark Sherman and Slava Kono for return of funds held in trust" (capitalization omitted) and stated, "The motion is argued and granted. Plaintiff Khazin and counsel are ordered to pay sanctions to Defendant in the sum of $3,750." No signed order appears in the record. Khazin and Lisitsa appeal the minute order.

CONTENTIONS

Khazin and Lisitsa contend the court had no jurisdiction after the voluntary dismissal to order either the return of funds or a monetary sanction, the court had no authority under either section 405.37 or section 1008 to order the return of funds, and the court had no authority to award a monetary sanction. They also challenge the order on other grounds that we need not address. Kono disputes these contentions and contends sections 187 and 1008 provided the court both the jurisdiction and the authority to modify its previous order to Taheri to turn over records and funds to Khazin.

DISCUSSION

1. *The Court Had No Authority under Section 405.37 to Order the Return of Funds Held in Trust Pursuant to the Stipulation*

A party to an action who asserts a claim affecting title to or the right to possession of real property may record a notice of pendency of action, or lis pendens. (§§ 405.20, 405.4.) Any party with an interest in the real property may move to expunge the lis pendens on the ground that the action does not involve a claim affecting title to or the right to possession of the real property or that the claimant has not established the probable validity of the claim. (§§ 405.31, 405.32.) If the court determines that the claim has probable validity but that adequate relief to the claimant can be secured by the giving of an undertaking, the court must order that the lis pendens be expunged upon the giving of an undertaking of a nature and in an amount that will indemnify the claimant from any damages resulting from the expungement in the event

that the claimant prevails on the claim. (§ 405.33.) Any party with an interest in the real property also may move to require an undertaking by the claimant as a condition to maintaining the lis pendens of record, and the court may order an undertaking of a nature and in an amount that it determines to be just. (§ 405.34.)

Section 405.37 states, "After notice and hearing, for good cause and upon such terms as are just, the court may exonerate or modify any undertaking required by an order issued pursuant to Section 405.33 or 405.34 or pursuant to a stipulation made in lieu of such an order. An order of the court under this section may be made conditional upon the giving of a new undertaking under Section 405.33 or 405.34." The plain language of the statute authorizes a court to exonerate or modify an undertaking if the undertaking was either (1) required by an order under section 405.33 or 405.34, or (2) given pursuant to a stipulation made in lieu of an order under section 405.33 or 405.34.

The Bond and Undertaking Law (§ 995.010) applies to an undertaking given as security pursuant to any California statute. (§ 995.020, subd. (a).) It defines "undertaking" as "a surety, indemnity, fiduciary, or like undertaking executed by the sureties alone" (§ 995.190), and states that undertakings and bonds may be used interchangeably and that statutory references to one shall be deemed references to the other (§ 995.210). "A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." (Civ. Code, § 2787; see Code Civ. Proc., § 995.185, subd. (a).) An undertaking must be executed by an admitted surety insurer or by two or more personal sureties, or by any

combination of admitted surety insurers and personal sureties. (§ 995.310.) An undertaking must be in writing and signed under oath, and must be filed in the action in which it is given unless the statute providing for an undertaking states otherwise. (§§ 995.320, 995.340.) An undertaking remains in effect until the sureties withdraw or a new undertaking is given in place of the original undertaking, the purpose for which the undertaking was given is either satisfied or abandoned with no liability incurred, a judgment of liability on the undertaking is satisfied, or the term of the undertaking expires, whichever occurs earliest. (§ 995.430.)

The principal may make a deposit in lieu of giving an undertaking by depositing with the court clerk, or other public official to whom an undertaking would be given, money or other valuable instruments together with an agreement authorizing the official to apply the deposit to enforce the liability of the principal. (§§ 995.710, 995.160.) A deposit in lieu of an undertaking has the same force and effect as an undertaking, is treated the same as an undertaking, and is subject to the same statutory provisions. (§ 995.730.)

The liability on an undertaking given in an action may be enforced on a motion made after the entry of judgment and after the time to appeal has expired, without the necessity of an independent action. (§ 996.440, subds. (a)-(c).) The court must enter a judgment against the principal and sureties in accordance with the motion unless they file affidavits that create a triable issue of fact as to their liability, in which case the matter must be tried. (§ 996.440, subd. (d).)

The stipulation here provided that Khazin would withdraw the lis pendens (see § 405.50) in exchange for Kono providing $37,500 to be held in trust by Taheri pending the resolution of this action. The stipulation was signed by only Taheri as counsel for Khazin and Berk as counsel for Kono. The stipulation did not provide for an undertaking by a surety as defined in the Bond and Undertaking Law, and was neither signed by a surety under oath nor filed in the action as would be required for an undertaking. Moreover, the stipulation did not provide for a deposit with the court clerk in lieu of an undertaking. We conclude that the stipulation created neither an undertaking nor a deposit in lieu of an undertaking and that section 405.37 therefore is inapplicable. Section 405.37 authorizes a court to "exonerate or modify" only an "undertaking," and did not authorize the court to exonerate, modify, enforce, or provide a remedy for a breach of the stipulation.

We need not decide whether a court retains jurisdiction to "exonerate or modify" an undertaking under section 405.37, or a deposit in lieu of an undertaking, after a voluntary dismissal because we conclude that section 405.37 did not authorize the court to order the return of funds held in trust pursuant to the stipulation.

2. *Neither Section 187 nor Section 1008 Established a Basis for Jurisdiction for the Court to Modify its Prior Order after the Voluntary Dismissal*

A voluntary dismissal pursuant to section 581 generally terminates the court's subject matter jurisdiction in an action. (*Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120.) The court ordinarily retains jurisdiction only as to "collateral statutory rights" such as costs and attorney fees, and

otherwise has no jurisdiction to act further in the action. (*Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357; see *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 384; *Associated Convalescent Enterprises*, *supra*, at p. 120.)

Section 187 states: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the code." Section 187 authorizes a court to adopt suitable means to carry out its jurisdiction when some other authority confers jurisdiction on a court, but the statute does not establish an independent basis for jurisdiction. (*Union etc. Co. v. Superior Court* (1906) 149 Cal. 790, 792-793.) Section 187 therefore did not extend or revive the court's jurisdiction after the voluntary dismissal.

Section 1008 authorizes a court to reconsider its interim orders on the motion of a party, but a court has no jurisdiction under section 1008 to reconsider a prior ruling after the entry of judgment. (*Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177.) The same is true after a voluntary dismissal because, as we have stated, a voluntary dismissal generally terminates the court's subject matter jurisdiction in an action. We therefore conclude that, assuming arguendo that we could consider Kono's motion made under section 405.37 as a motion for reconsideration under section 1008, the court had no jurisdiction to grant relief on the motion after the voluntary dismissal.

4. *The Attorney Fee Award Must Be Reversed*

The court characterized the award of $3,750 against Khazin and Lisitsa as his counsel as "sanctions" but cited no authority for an award of sanctions. In the context of a ruling on a motion under section 405.37, which the court treated as a motion under section 1008, subdivision (b), we conclude that the court intended the award of $3,750 as either an attorney fee award to Kono as the prevailing party pursuant to section 405.38[2] or an award of sanctions under section 128.7 pursuant to section 1008, subdivision (d).[3] To the extent the fee award is based on section 405.38, our reversal of the order granting the motion to return funds necessarily compels the reversal of the award of fees to the prevailing party. (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.) To the extent the award is based on section 128.7, we conclude that just as the court had no jurisdiction to reconsider its prior ruling after the voluntary dismissal, the court had no jurisdiction to award attorney fees to the prevailing party on a motion for reconsideration that it had no jurisdiction to hear.

Khazin's request for a determination on appeal that he is entitled to recover his attorney fees under section 405.38 is denied.

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[2] Section 405.38 states: "The court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorneys fees and costs unjust."

[3] Section 1008, subdivision (d) states, in relevant part: "A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7."

DISPOSITION

The minute order of October 25, 2005, is reversed in its entirety. Khazin and Lisitsa are entitled to recover their costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.